

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES I. WELLS)	
Claimant)	
V.)	
)	
ENVISION, INC.)	Docket No. 1,063,287
Respondent)	
AND)	
)	
ACCIDENT FUND)	
NATIONAL INSURANCE)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent), by and through Dallas L. Rakestraw, of Wichita, request review of Administrative Law Judge John D. Clark's June 26, 2014 preliminary hearing Order. R. Todd King, of Wichita, appeared for claimant.

RECORD AND STIPULATIONS

This Board Member adopts the same stipulations and considers the same record as did the judge, consisting of the March 28, 2013 preliminary hearing transcript, the March 25, 2014 deposition transcript of Paul Stein, M.D., the June 26, 2014 preliminary hearing transcript, all exhibits for such transcripts, and the documents of record filed with the Division.

ISSUES

The judge concluded claimant proved a compensable injury by repetitive trauma. Respondent seeks reversal of the June 26, 2014 preliminary hearing Order, arguing claimant did not prove personal injury by repetitive trauma arising out of and in the course of his employment and claimant's work was not the prevailing factor in his medical condition. Claimant argues the ALJ's Order should be affirmed.

The issues are:

1. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of his employment?
2. Was claimant's work the prevailing factor for his medical condition?

FINDINGS OF FACT

Claimant, age 59, alleged injury by repetitive trauma in connection with his job for respondent as a machine operator for approximately five and one-half years. Claimant's job duties also included lifting cases of commercial trash bags onto pallets, which required repetitive bending, twisting and climbing. Claimant asserted an October 17, 2012 date of injury by repetitive trauma.

Claimant began consulting his personal physician, Travis Hubin, M.D., for back pain on May 8, 2012.¹ Lumbar x-rays conducted on May 8, 2012 revealed mild L3-4 and L4-5 disk space narrowing and grade I spondylolisthesis at L3-4. Dr. Hubin diagnosed claimant with low back pain. Claimant was given an off work slip and instructed to alternate heat and ice. Dr. Hubin provided claimant conservative treatment through October 19, 2012.

On October 23, 2012, respondent sent claimant to Benjamin Norman, M.D. Dr. Norman examined claimant only once. Claimant complained of low back pain and stated he first noticed the pain in late summer or fall 2012. He reported receiving treatment from Dr. Hubin. Claimant told Dr. Norman he was not getting any better and the idea was brought up that his pain could be work-related, but he never had a specific trauma or injury at work. Dr. Norman diagnosed lumbar degenerative joint disease and recommended a lumbar MRI scan, which was not authorized. Dr. Norman stated:

I explained to Mr. Wells that at this point with no trauma or specific incident for circumstances precipitating his injury that this would be considered to be degenerative and not [a] work-related issue.²

Dr. Norman encouraged claimant to continue treatment with Dr. Hubin. He also told claimant there was potential for improvement once a definitive diagnosis was made. He recommended claimant continue with Dr. Hubin's restrictions.

At the request of claimant's counsel, Pedro Murati, M.D., who is board certified in physical medicine and rehabilitation, evaluated claimant on January 18, 2013. Claimant told Dr. Murati he experienced back pain in August 2012. Claimant complained of severe low back pain that shoots down his right leg, popping in the low back with movement, and difficulty sitting, standing and sleeping due to low back pain. Claimant reported his injuries are due to his repetitive job duties. Dr. Murati noted claimant's major job duties entailed maintaining and operating machines and stacking materials on pallets. He lifted 65 pounds occasionally and 10-50 pounds frequently. The job also required bending, stooping, pushing, pulling, standing, grasping, writing, typing, crouching, kneeling, and reaching.

¹ Dr. Hubin's treatment records are not in evidence.

² P.H. Trans., Resp. Ex. 2 at 1.

Dr. Murati's examination of claimant revealed: missing bilateral hamstring reflexes; a decreased right S1 dermatome sensation; 4/5 bilateral great toe extensors; L5 and S1 spinous processes were most tender to palpation with an increased tone bilaterally, worse on the right; SLRs were grossly negative bilaterally; positive pelvic compression exam on the right; positive right SI joint exam; pelvic brim revealed the left hip to be rotated and the right to be hiked; and negative axial load, distraction, axial rotation and flip exams. Dr. Murati wrote that claimant's lumbar x-ray showed mild spina bifida occulta.

Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy and right SI joint dysfunction. Dr. Murati recommended a lumbar MRI and a discogram. He recommended an NCS/EMG to document any radiculopathy. Dr. Murati recommended physical therapy, anti-inflammatory and pain medication and both lumbar epidural steroid injections and SI joint cortisone injections. Dr. Murati noted claimant might need a surgical evaluation. Dr. Murati also recommended claimant might need possible instruction on the use of the SI belt and/or gait training.

Dr. Murati opined claimant sustained multiple repetitive traumas at work which resulted in low back pain. He found claimant's repetitive trauma at work to be the prevailing factor in the development of claimant's conditions.

In a March 28, 2013 Order, the ALJ appointed Dr. Paul Stein to address whether "[c]laimant's employment is the prevailing factor for his present problem." Dr. Stein examined claimant on April 23, 2013. Dr. Stein, in his corresponding report, stated:

The pathology on x-rays is degenerative in nature with no evidence of acute trauma. I cannot objectively document whether this pathology existed prior to the claimant's employment at Envision but the findings are not atypical for the spine of a 58-year-old male without regard to work activity. There are two areas to consider; 1. Did the work activity itself cause the degenerative disease? 2. Did the work activity represent a severe aggravation of the degenerative disease?

It is unlikely that the formation of this degenerative disease is specifically related to his work activity. To what extent the work activity may have aggravated the degenerative disease is difficult to determine. Unfortunately, I do not have a really clear understanding of his work activity such as how many pounds of lifting was done, how often and how repetitively was it done, and how repetitive was bending and twisting. If a more specific description of the job can be made available, I would like to have that for review. Also, if there are medical records available prior to January of 2012, particularly primary care records for the previous few years, it would be helpful. The best I can state at this time is that there has been no documentation that the primary or prevailing factor in Mr. Wells' symptoms, need for treatment, and any specific functional impairment is the work activity performed over time.³

³ Stein Report (Apr. 23, 2013) at 5.

Thereafter, information concerning claimant's job was provided to Dr. Stein by both counsel. Thereafter, Dr. Stein authored a June 6, 2013 report, in which he opined:

Assuming the accuracy of the description by Mr. Wells the following are my opinions regarding causation; 1. As noted in my previous report, the primary problem here is degenerative disk disease. It is unlikely that the disk degeneration was caused specifically by the work activity. However, it is more likely than not that the work activity over time was a factor contributing to the current symptomatology, aggravating and accelerating degenerative disease. 2. It is difficult to make a definitive statement regarding the prevailing or primary factor in the current symptomatology. It is a combination of aging and the repetitive work activity. In this particular case, I cannot tell which factor was more important. 3. Given that the work activity likely accelerated the development of degenerative disease, over time, it would be productive of a structural change in the lower back.⁴

The judge issued a preliminary hearing Order on July 24, 2013. The order focused on Dr. Stein's statement about a "structural change in the lower back"⁵ and concluded the prevailing factor in claimant's injury was his repetitive work. Respondent was ordered to provide benefits, but appealed, arguing claimant's work activity was not the prevailing factor in causing his injury and his injury did not arise out of his employment.

In a September 24, 2013 report, Dr. Stein recommended lumbar x-rays and an MRI. In an October 3, 2013 report, Dr. Stein noted the MRI showed desiccation of the L3-4 disk with mild bulging and mild left-sided stenosis of the foramen, as well as partial desiccation of the L4-5 disk with mild left central protrusion. Such findings were not truly consistent with claimant's right anterior thigh symptoms. Dr. Stein recommended physical therapy and a right L4-5 epidural steroid injection for diagnostic/therapeutic purposes.

On October 7, 2013, Board Member Gary Terrill ruled:

Claimant had no injuries or other issues with his low back before he commenced employment for respondent, although he did have asymptomatic lumbar degenerative disease. The degenerative disease evident by x-rays was not caused by claimant's work activities. There was evidence that claimant's work triggered, precipitated, aggravated, accelerated or made symptomatic the preexisting degeneration in claimant's low back. Under the Old Act claimant's alleged series of repetitive trauma might have been compensable. However, the 2011 amendments to the Act altered the requirements necessary to prove a compensable claim.

⁴ Stein Report (June 6, 2013) at 1.

⁵ ALJ Order (July 24, 2013) at 1.

The causation opinions of Drs. Norman and Murati provide little assistance in resolving the issue of causation. Dr. Norman opined claimant's condition was degenerative in nature and not work-related. However, Dr. Norman seemed to base his opinion, at least in part, on the lack of a specific trauma or work-related event. Of course, a compensable claim may result from personal injury by repetitive trauma and occupational disease, without a specific traumatic event or work-related incident. Dr. Murati concluded claimant sustained personal injury by a series of repetitive trauma and that claimant's work activity was the prevailing factor in causing claimant's injury. But, in expressing his causation opinion, Dr. Murati mentioned nothing about claimant's preexisting degenerative disease and what role it played in causing claimant's low back symptoms.

The court-ordered physician, Dr. Stein, who was selected to perform the neutral examination by agreement of the parties, did not state claimant's work activities were the prevailing factor in causing claimant's injury. He said it was difficult for him to make a definitive statement regarding the prevailing or primary factor in claimant's current symptoms and that both age and repetitive work activity were factors. However, he could not tell which factor was more important. In the opinion of this Board Member, the preponderance of the credible evidence is insufficient to support the conclusion that the prevailing factor in causing claimant's injury was the repetitive activities required by his work.

The ALJ emphasized Dr. Stein's phrase "structural change in the lower back." However, when read in context, it is clear the doctor was referring to the acceleration of claimant's degenerative disease. Under the New Act, the acceleration of a preexisting condition, in and of itself, does not result in a compensable claim.

...

This Board Member finds claimant did not sustain his burden to prove personal injury by repetitive trauma arising out of and in the course of his employment with respondent and claimant did not prove his repetitive work was the prevailing factor in causing his injury.⁶

Claimant's attorney and Dr. Stein met on November 14, 2013. Dr. Stein's corresponding report stated claimant's work activity likely produced "a structural change in the lower back." Based on claimant's lack of significant symptoms before working for respondent, Dr. Stein opined claimant's work for respondent was "more likely than not the primary or prevailing factor in the current symptomatology and need for treatment."

On February 3, 2014, Dr. Stein met with respondent's attorney. Dr. Stein's corresponding report stated claimant's work activity likely resulted in structural changes, and such work activity aggravated and accelerated degenerative change.

⁶ *Wells v. Envision, Inc.*, No. 1,063,287, 2013 WL 5983253 (Kan. WCAB Oct. 7, 2013).

On February 18, 2014, the judge ordered respondent to take Dr. Stein's deposition. Dr. Stein was deposed on March 25, 2014. Dr. Stein testified:

- claimant's work was the prevailing, primary or most significant factor in his need for treatment;⁷
- claimant's work was the prevailing factor in aggravating and accelerating preexisting degenerative changes in claimant's lumbar spine and such work made such structural changes occur more rapidly and to a greater degree than what would occur in the natural history of degenerative disc disease;⁸
- claimant's underlying degenerative condition was not caused by his work;⁹
- claimant had a structural change based on his symptoms;¹⁰
- claimant's work was the precipitating factor in causing or rendering claimant's underlying degenerative condition to become symptomatic;¹¹
- claimant's work was a triggering event causing his symptoms,¹² but his work was not merely a triggering event because his work "was part of the process of changing the structure of the spine"¹³ and accelerated structural change;
- claimant would be less likely to currently need medical treatment for his back absent his work activity;¹⁴ and
- despite claimant's work being the prevailing factor in his need for medical treatment, "it doesn't obviate the fact that [claimant] meets the criteria of two opposing parts of the statute."¹⁵ Dr. Stein testified the law was a "problem."¹⁶

⁷ Stein Depo. at 6, 9-10, 22.

⁸ *Id.* at 7-9, 12-16, 19.

⁹ *Id.* at 12.

¹⁰ *Id.* at 12, 17-19.

¹¹ *Id.* at 12, 17.

¹² *Id.* at 15.

¹³ *Id.* at 16.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 23.

After reviewing Dr. Stein's March 25, 2014, deposition the judge found the prevailing factor for claimant's present problems is the repetitive nature of claimant's work. The judge ordered Dr. Stein to be claimant's authorized treating physician and all medical to be paid as authorized. Respondent appealed the Order.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508 provides in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

...

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

The application of the new law to the specific facts of this case resulted in extended analysis, debate and discussion among the Board Members.

Dr. Stein testified claimant sustained a structural change to his lumbar spine and his work activities were the prevailing factor in his need for medical treatment. Such stand-alone conclusions do not result in compensability. Even if claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment and even if his repetitive trauma was the prevailing factor in causing his injury and need for medical treatment, K.S.A. 2012 Supp. 44-508(f)(2) excludes certain injuries from compensability.

K.S.A. 2012 Supp. 44-508(f)(2) states an injury is not compensable solely because it aggravates or accelerates a preexisting condition or renders a preexisting condition symptomatic. Dr. Stein testified claimant's work aggravated and accelerated a preexisting condition and rendered a preexisting condition symptomatic. Accordingly, claimant's injury is not compensable. It appears Dr. Stein recognized this dilemma when he testified his prevailing factor opinion "doesn't obviate the fact that this man meets the criteria of two opposing parts of the statute." This is a difficult decision, but this Board Member must interpret and apply the law as written.

CONCLUSIONS

After reviewing the current record, the undersigned Board Member concludes K.S.A. 2012 Supp. 44-508(f)(2) bars compensability because claimant's injury solely aggravated and accelerated a preexisting condition and rendered a preexisting condition symptomatic.

DECISION

WHEREFORE, the undersigned Board Member reverses the June 26, 2014 Order.¹⁷

IT IS SO ORDERED.

Dated this _____ day of August, 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

¹⁷ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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John D. Clark, Administrative Law Judge